Supreme Court, U.S.
FILED
MAR 2 1999
CLERK

No. 97-526

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

MARLENA RAMALLO,
Petitioner,

v.

JANET RENO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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On February 24, 1999, this Court decided *Reno* v. *American-Arab Anti-Discrimination Committee,* No. 97-1252. That decision established that 8 U.S.C. § 1252(g), enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), withdrew federal-court jurisdiction of a pending challenge to the Attorney General's decision to "commence [deportation] proceedings, adjudicate cases, or execute removal orders;" and also that IIRIRA did not withdraw federal jurisdiction in pending cases outside those specified categories. Slip Op. 16. Based on that opinion, this judgment should be vacated and the case remanded to the Court of Appeals.

After observing that a "broad understanding" that "treat[s] § 1252(g) as covering all or nearly all deporta-

tion claims" would "create[] an interpretive anomaly," slip op. 7, this Court in *American-Arab* rejected "the unexamined assumption that § 1252(g) covers the universe of deportation claims," *id.* at 11, and held that "[i]n fact, what § 1252(g) says is much narrower," *id.*:

> "The provision applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.' (Emphasis added.) There are of course many other decisions or actions that may be part of the deportation process . . . .
>
> "It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings."

Slip op. 11 (emphasis by the Court). Yet it was on exactly such an "unexamined" and "implausible" expansive reading of § 1252(g) that the decision of the Court of Appeals here depended, in holding that § 1252(g) required vacating a contract decision regarding lawful-permanent-resident status that was not one of the "three discrete events," slip op. 11, to which the statute is limited.

The *American-Arab* decision establishes that the decision of the District of Columbia Circuit to which this petition for certiorari is directed rested on a misunderstanding of § 1252(g). Further, as the petition has shown, if § 1252(g) were held to extend to a contract-enforcement case like this one, that would create issues of retroactivity that the Court of Appeals resolved contrary to this Court's decisions.

I.

The complaint here, as the District Court explained,[1] sought specific performance of a contract by the government similar to a plea bargain, and invoked also estoppel and the Due Process Clause of the Fifth Amendment.[2] The District Court found that in compliance with that agreement petitioner, in exchange for the government's promise to award her lawful-permanent-resident status, had withdrawn a challenge to deportation and had testified as a government witness in criminal prosecutions of major South American drug traffickers, thereby placing her life at risk.[3] P.C.A. 46-47, 50-51, 57-58. Jurisdiction for the

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[1] The District Court pointed out that

> "Here, the plaintiff's Complaint does not challenge the validity of the deportation order or a determination made in the deportation proceedings . . . . Rather, the plaintiff alleges breach of an agreement and violation of her Fifth Amendment rights due to the alleged breach. The plaintiff seeks specific enforcement of the agreement . . . ."

P.C.A. 24. The District Court's decision was not a "review of execution of removal order," *cf. American-Arab*, slip op. at 14. Rather, its order found "that the government entered into a legal and binding agreement with the plaintiff not to deport her in exchange for her cooperation" and directed "that the government and its agents shall take any and all reasonable steps necessary to restore the plaintiff's status as a permanent resident of the United States," P.C.A. 58; see also P.C.A. 62; P.C.A. 19 n.5 (noting that relief against deportation order not sought). (References to "P.C.A." are to the appendix to the petition for certiorari.)

[2] "The United States are as much bound by their contracts as are individuals." *United States* v. *Winstar Corp.*, 518 U.S. 839, 912 (1996) (Breyer, J., concurring), quoting *Sinking Fund Cases*, 99 U.S. 700 (1879); *cf. Santobello* v. *New York*, 404 U.S. 257 (1971) (enforceability of plea agreements).

[3] The government conceded in the Court of Appeals that "Ramallo may be at risk if she returns to Bolivia" and that "she may have some problems" in "arrang[ing] for another country to accept her." Reply Brief for Appellants, U.S.C.A., D.C. Cir., No. 96-5265, at 6-7. The government said that "it is a problem that Ms. Ramallo herself

civil suit rested on 28 U.S.C. § 1361 (action to compel federal official to perform duty owed to plaintiff), and 28 U.S.C. § 1331 (federal question).[4]

The Court of Appeals simply assumed that § 1252(g), which explicitly deals with review of three specified deportation decisions or actions, would in addition deny jurisdiction of a civil suit for specific performance of a contract that did not involve review of a decision to "commence proceedings, adjudicate cases, or execute removal orders." See P.C.A. 6. Without analysis or explanation, the Court of Appeals asserted that the contract action "arises from 'the decision or action' of the Attorney General to execute a removal order against Ramallo." *Id.* But this Court's opinion in *American-Arab* emphasized that § 1252(g)'s withdrawal of jurisdiction in pending cases was *not* all-encompassing, and that the statute's terms "commence proceedings, adjudicate cases, or execute removal orders" were words of limitation that left many other kinds of deportation-related proceedings outside their scope. See slip op. 11. The Court of Appeals did not have available to it this Court's analysis and interpretation of § 1252(g).

II.

The Court of Appeals then extended § 1252(g) even farther, to hold that the statute also mandated retroactive vacatur of a final judgment entered prior to IIRIRA.

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must address," and that "the failure to grant Ramallo the relief she seeks does *not necessarily* mean that she will die." *Id.* at 7 (emphasis supplied).

[4] The civil suit was filed after the Board of Immigration Appeals ruled that "even if such agreement existed we are powerless to enforce it" and "we are without authority to apply such equitable doctrine against the [Immigration and Naturalization] Service." P.C.A. 78; see also P.C.A. 18.

After ruling that "it is clear that this court lacks appellate jurisdiction over the subject matter of this case," P.C.A. 2, nevertheless the Court of Appeals then held that § 1252(g) commanded it to vacate the District Court's judgment. The court reasoned that "we believe that Congress intended to afford this court residual jurisdiction to clear the decks of cases in which the District Court has entered judgment, but in which there can be no review by the Court of Appeals due to its lack of jurisdiction pursuant to IIRIRA." P.C.A. 6.

The Court of Appeals cited no textual language, nor any legislative history, on which to base this ruling.[5] Such reliance on an unexpressed congressional intent to vacate without review a final district-court judgment ignores not only established rules of statutory construction, but also this Court's specific admonition that "we have long embraced a presumption against statutory retroactivity." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 273 (1994). "If the statute would operate retroactively, our tradi-

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[5] The Court of Appeals believed that cases like *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), in which judgments have been vacated after altered circumstances mooted disputes, furnished adequate authority by analogy. P.C.A. 6. They do not. Nothing about petitioner's contract claim became moot. Also, mootness by "happenstance," 340 U.S. at 40, involves the situation of the parties in a particular case—not a flat withdrawal by Congress for an entire category of cases of the courts of appeals' subject-matter jurisdiction.

Even if mootness rules were thought applicable, they were not followed here. When deciding whether to vacate for mootness, "[t]he principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 24 (1994). Yet the Court of Appeals failed completely to perform any analysis like that prescribed in *U.S. Bancorp*, and the parties had not even briefed the issue. And obviously, it was not petitioner who was responsible for the new statute enacted after her judgment against the government.

tional presumption teaches that it does *not* govern absent *clear congressional intent* favoring such a result." *Id.* at 280 (emphasis supplied). No identification of such "clear congressional intent" was even attempted here. The "time-honored presumption" against retroactive legislation is applied "unless Congress has clearly manifested its intent to the contrary." *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 946 (1997). Nothing in *American-Arab*, which reviewed an interlocutory ruling in a case that was still pending in the district court, and which indeed emphasized the narrowness of § 1252(g), suggests otherwise.

This retroactivity construction converted the government's loss in the District Court legislatively into a victory, omitting any review of the merits. To do that was not merely procedural; it "altered the nature or validity of petitioner's rights or the Government's liability." *Bruner* v. *United States*, 343 U.S. 112, 117 (1952). If, as the Court of Appeals believed, § 1252(g) withdrew appellate jurisdiction, then the proper disposition was to dismiss the appeal—not to exercise jurisdiction to take away petitioner's judgment enforcing the government's bargain, relief not obtainable in the INS administrative tribunals. See P.C.A. 18, 78.[6]

American-Arab did not have occasion to address this retroactivity issue, for it examined a court of appeals' interlocutory review of a preliminary injunction. See slip op. 3-4; 119 F.3d at 1370. The District Court here, how-

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[6] *Cf. Ex parte McCardle*, 7 Wall. 506, 514 (1868):

> "What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

ever, had conducted an evidentiary hearing, made findings of fact and conclusions of law, and entered what it explicitly pointed out was a final decision, upholding and enforcing petitioner's contract claim several months before IIRIRA was enacted. P.C.A. 56-58, 60-61. The government's notice of appeal accordingly invoked 28 U.S.C. § 1291, which is limited to "final decisions of the district courts." Section 1252(g) was applied, not as in *American-Arab* to terminate a pending district-court proceeding, but rather to undo a final judgment already entered by a district court in a civil case that had been concluded.[7] If § 1252(g) were held to apply here, the serious retroactivity issues raised in this petition, and not present in *American-Arab*, would remain. Those issues have been described by one court of appeals, in an opinion cited by the government, Br. Opp. 19, and later superseded, as a "dilemma." *Auguste* v. *Attorney General*, 118 F.3d 723, 727 (11th Cir. 1997), *superseded*, *Auguste* v. *Reno*, 152 F.3d 1325 (11th Cir. 1998).[8]

CONCLUSION

For the reasons stated, certiorari should be granted, the judgment of the Court of Appeals vacated in light of

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[7] Petitioner filed her complaint September 25, 1996. Pet. Cert. 5. The District Court entered its final decision July 3, 1996, P.C.A. 56, with clarifying order July 23, 1996, P.C.A. 62. The government filed its notice of appeal September 4, 1996. Pet. Cert. 7. IIRIRA was enacted September 30, 1996. 110 Stat. 3009.

[8] See also *Auguste* v. *Reno*, 140 F.3d 1373 (11th Cir. 1998), *withdrawn*, 152 F.3d 1325 (11th Cir. 1998); *Henderson* v. *INS*, 157 F.3d 106, 118 n.8 (2d Cir. 1998), *pet'ns for cert. pending*, Nos. 98-996 and 98-1160. *Jean-Baptiste* v. *Reno*, 144 F.3d 212 (2d Cir. 1998), cited the present decision in affirming a district court judgment of dismissal of a challenge to deportation procedures; in that case the district court had entered its judgment after the enactment of IIRIRA, nor did the affirmance deprive the individuals of any relief obtained in district court.

Reno v. *American-Arab Anti-Discrimination Committee*, and the case remanded for appropriate proceedings. Alternatively, certiorari should be granted and the case set for argument.

Respectfully submitted,

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